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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONERS.

LEWIS LANDES,
Counsel for Petitioners.

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vs.

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BRIEF FOR THE DEFENDANTS, PETITIONERS.

Writ of Certiorari to a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Western District of New York.

The decree of the Circuit Court of Appeals was entered on the 21st day of April, 1930.

Statement.

THE WATERLOO DISTILLING CORPORATION, a New York corporation, received permits from the Prohibition

Authorities to operate a distillery at Waterloo, New York, for the manufacture of alcohol, and to conduct a denaturing plant for the denaturation of alcohol (R., pp. 24-25). The Distillery filed with the Government, bonds of a Surety Company for $300,000 (R., pp. 24-25).

The Waterloo Distilling Corporation, and others, were convicted after a trial in the United States Court for the Western District of New York, on the 11th day of May 1928 for conspiracy to violate certain provisions of the National Prohibition Act (R., p. 21).

Subsequent to this conviction a libel was filed on the 17th day of September, 1928, in the Western District of New York (R., p. 2). Verified answers were interposed by the libellees (R., pp. 7-14).

On December 13, 1928, the issues were tried, and a verdict rendered in favor of the Government, on both counts in the libel (R., p. 172). Judgment was entered on the 31st day of January, 1929 (R., p. 19), forfeiting to the United States the real property of the distillery, and its apparatus, alcohol and articles listed in Schedules A and B of the libel.

Statutes Involved.

Section 3214 of the Revised Statutes is as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings. Provided, That in case of any suit for penalties or forfeitures brought upon information received

from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

Section 3247 of the Revised Statutes is as follows:

"Every person who produces distilled spirits, or who brews or makes mash, wort or wash, fit for distillation or for the production of spirits, or who by any process of evaporization, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller."

Section 3257 of the Revised Statutes is as follows:

"Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than $500 and be imprisoned not less than six months nor more than three years."

Section 3281 of the Revised Statutes is as follows:

"Every person who carries on the business of a distiller without giving bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every

such offense be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every such person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress, to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

Section 3287 of the Revised Statutes has to do with the method of withdrawing alcohol from the cistern into casks by a distiller, and need not be considered on this appeal.

Section 600-A of the Revenue Act of 1918, as amended, is as follows (Section 245, Title 26 U. S. C. A.):

> "S. 245. Tax on Distilled Spirits.—There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. * * *
>
> (4) On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

Libel.

The libel charged that between October 1, 1926, and March 1, 1927, the petitioners manufactured and shipped specially denatured alcohol, but entered on its records and reported to the Government that it manu-

factured and shipped completely denatured alcohol, thereby carrying on its business as a distillery, with the intent to defraud the United States of the tax imposed by Section 600-A of the Revenue Act of 1918 as amended, 26 U. S. C. A., Section 45, and thus making the property subject to forfeiture under Sections 3257 and 3281 of the Revised Statutes.

ARGUMENT.

I.

No tax was payable under Section 600-A of the Revenue Act for the reasons that distilled spirits were not diverted nor manufactured into an article used or intended for use as a beverage.

The libel is predicated upon the theory that the Waterloo Distilling Corporation entered on its records and reported to the Government that it manufactured and shipped completely denatured alcohol, whereas, it really manufactured and shipped specially denatured alcohol, thereby diverting this specially denatured alcohol to beverage purposes, and hence making same subject to tax at the beverage rate of $6.40 per proof gallon as provided for in Section 600-A of the Revenue Act of 1918 as amended February 26, 1926.

The Government's reasoning is absolutely fallacious, because Section 600-A as amended, provides a tax on distilled spirits diverted to beverage purposes, or on distilled spirits used in the manufacture of an "article" which is fit for beverage purposes, and which is diverted to such beverage purposes.

It is submitted that the manufacture and shipment of specially denatured alcohol, and the reporting that completely denatured alcohol was manufactured and shipped, instead, is merely a violation of the Regulations under the Prohibition Act, providing that proper records be made and kept, and that proper reports of operations be made to the Government. There is nothing in this whole record to show that the WATERLOO DISTILLING CORPORATION was connected with any plan whereby it was intended that the corporation or anyone else, was to extract the poison from this denatured product, making same fit for beverage purposes. On the contrary, the record, page 164, shows that the lower Court charged the Jury in effect that there was no such charge made by the Government nor any facts supporting same.

Denatured alcohol is not a distilled spirit, and is not fit for beverage purposes.

The Court in its charge to the Jury stated in part as follows:

> "In arriving at your conclusion on that point, I call your attention to the fact that there is no direct evidence in this case that any particular bit of this alcohol that went out of that plant was diverted to some particular place, and at that particular place used for beverage purposes." (R., p. 164, fol. 262.)

The Government chemist testified in part as follows:

> "I wouldn't say that specially denatured alcohol is fit for beverage purposes. Specially

> denatured alcohol is tax-free and completely denatured alcohol 5 is tax-free."

Denatured alcohol is defined by Regulations 61 promulgated by the Treasury Department and revised July, 1925, page 81, as follows:

> "Art. 88. Denatured alcohol is ethyl alcohol to which has been added such denaturing materials as render the alcohol unfit for use as an intoxicating beverage. It is free of tax and is solely for use in the arts and industries."
>
> * * * * * * *
>
> "Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit of its use in a greater number of specialized arts and industries than completely denatured alcohol. The character of the denaturant or denaturants is such that it may be sold, possessed, and used only pursuant to permit and bond except as otherwise provided herein."
>
> "Art. 89. Alcohol may be withwrawn free of tax for denaturation in an approved denaturing plant as hereinafter provided." * * *

The decision of this Court in Campbell *vs.* Long and Company, 281 U. S. 610, and Campbell *vs.* Galeno Chemical Co., 281 U. S. 599 (both dated May 26, 1930), made subsequent to the decision of Court below herein, *held that denatured alcohol, however treated, is not fit for beverage purposes.*

Mr. Justice Brandeis in his opinion said in part as follows:

> * * * "The permit held by plaintiffs authorize them to convert something which is undoubtedly liquor into a product which is required to be unfit for use as a beverage; that is, to convert liquor into something which is not liquor."

In the footnote of the Galeno case, Justice Brandeis further pointed out in his opinion as follows:

> * * * "Alcohol is unquestionably liquor. It is therefore urged that the same is true of any liquid, which, like alcohol, is immediately or mediately fit for use as a beverage and otherwise answers the definition of 'liquor.' Aside from the argument developed in the text, there are two short answers to this contention. First, alcohol is expressly included in the definition of 'liquor' in Sec. 1. No argument can, therefore, be based on the fact that pure alcohol is not immediately fit for use as a beverage. Second, there is no evidence whatever in the record that the plaintiffs' preparations can mediately be fitted for that purpose by the simple process of adding water—or by any other process."

In the Long case, footnote number 1, the Court defined specially denatured alcohol, by quoting Article 88, Regulations 61 of the Treasury Department and which appears hereinabove. In footnote number 7, Justice Brandeis also pointed out as follows:

> "We are not told what denaturants plaintiffs use; but we are asked to take judicial notice that denatured alcohol may be fitted for beverage purposes by extracting the denaturant. We may also take judicial notice that some

> denaturants can not be successfully extracted; and that any denaturants must be 'such that it can not be removed from the mixture and the treated product made fit for beverage purposes without great difficulty.' See 'Industrial Alcohol,' a monograph issued by the Treasury Dept., Bureau of Prohibition, p. 4 (Gov't Ptg. Office, 1930). *Moreover, from the standpoint of caution, denatured alcohol, however treated, is not fit for beverage purposes.*" (Italics ours.)

In Campbell *vs.* Galeno, *supra*, Mr. Justice Brandeis stated:

> "The Government contends that Sec. 1, Title II, of the Act defines the word 'liquor' as meaning not only the beverages specifically named but also any liquids 'containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes'; that liquids which are not immediately fit for use as beverages are yet 'fit for use for beverage purposes' if they can be made potable by a simple process" * * *.
>
> "We are not here concerned with the nature of the preparations in their varying states of development. Our concern is with the object of the permits. This object, and the permission granted, is not simply to manufacture varyingly unfinished products; but to manufacture specified articles containing whiskey, alcohol or other spirits. The spirits are, by Sec. 4, called 'articles' and are expressly excluded from the effect of the term 'liquor'. Moreover, Sec. 4 authorizes the issuance of permits for the use of whiskey, etc., in the

> manufacture of medicinal and other preparations only 'that are *unfit* for use for beverage purposes'; while 'liquor' is defined in Sec. 1 as meaning liquids, in addition to those enumerated, 'which are *fit* for use for beverage purposes.' The two definitions are mutually exclusive. If the article to be manufactured is fit for use for beverage purposes, and therefore liquor, a permit under Sec. 4 can not be issued; and *vice versa.*"

Section 600-A refers specifically to the "article". In the instant case the article in question is specially denatured alcohol, and *this Court in the opinion hereinabove referred to, has finally settled that denatured alcohol is not liquor, and is not fit for beverage purposes.* We therefore submit that inasmuch as the Government admits that distilled spirits were not diverted *as such* and merely relies on the reasoning that it was diverted by being used in the "article" and since the "article" in this case is specially denatured alcohol, this reasoning has now been overruled by the decision of this Court in the cases hereinabove quoted, to the effect that denatured alcohol is not liquor, and is not fit for beverage purposes.

The apparent intention of Section 600-A is to levy a tax upon an intoxicating liquor, and not upon denatured alcohol which is not intoxicating.

Section 600-A makes no reference to the possibility of recovering the distilled spirits, from the "article" manufactured.

Section 3047 of the Revised Statutes (Section 485; Title 26), specifically applies to such a situation, and is as follows:

> "any person * * * who shall recover or attempt to recover by redistillation or by any other process or means, any alcohol rendered unfit for beverage or liquid medicinal purposes under the provisions of this section * * * shall on conviction of each offense be fined no more than $5,000 * * * and shall in addition forfeit to the United States, all personal property used in connection with his business, together with the buildings and lots or parcels of ground constituting the premises on which such unlawful acts are performed or permitted to be performed."

While Section 3047 was not made the basis of this libel, yet the Government's claim rests entirely on the supposition that the poisons were intended to be removed from this denatured alcohol, thereby making same subject to the tax provision of Section 600-A. This despite the charge of the Court to the Jury, in effect, that there was no evidence offered by the Government supporting this supposition.

Further proof that subdivision 4 of Section 600-A relied upon in the libel was enacted for taxing only of intoxicating beverages and not denatured alcohol, or the recovery of the spirits therefrom, is evident from the date of the amendment, to wit, February 26, 1926, on which date Section 3047 of the Revised Statutes was in full force and effect.

Intoxicating liquor is defined in the National Prohibition Act, Section 1, Title 2, as follows:

> "When used in Title 2 and Title 3 of this Act, (1) the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." * * *

The Circuit Court of Appeals in Higgins *vs.* Foster, *supra*, stated:

> "Section 6 uses the word 'liquor' which is defined by Section 1 of Title 2, and which seems to us clearly to be confined to beverages. It is true that it uses the word 'alcohol', but that, especially in its context precludes denatured alcohol, which is not potable." * * *

It is again pointed out to the Court that the position of the Government in the Long case, *supra*, is the same as that made in this case, namely, that because of the ease, as the Government contends, of extracting poisons from denatured alcohol, that same should be considered a liquor, notwithstanding the fact that liquor has been defined to the contrary in Section 1 of Title 2 of the National Prohibition Act. In the Long Company case the Government contended that denatured alcohol was equivalent to liquor, and hence subject to the same Regulations. Here, the position of the Government is, that denatured alcohol should be considered a distilled spirit, and therefore subject to tax.

This Court in the Long case did not agree with the above contention of the Government, and held that denatured alcohol, irrespective of the ease with which it might be cleaned, is not a liquor. It is the position of the Appellant in this case that it is likewise true, that denatured alcohol irrespective of the ease with which as claimed by the Government it may be cleaned or for that matter, irrespective of whether or not the denatured alcohol was sold in accordance with Regulations, is still not a distilled spirit, and not subject to any tax. Therefore, there can be no forfeiture of real and personal property, because of the non-payment of such tax.

II.

Sections 3257 and 3281 of the Internal Revenue laws cannot be invoked for the reason that there is no tax on the articles referred to in those sections as applied to this case.

THE WORD "TAX" MEANS PENALTY.

The National Prohibition Act specifically provides that denatured alcohol is not taxable (Section 4 N. P. A., Title 2). The purpose of the National Prohibition Act was to prevent illicit manufacture and sale of intoxicating liquor. It is not an Act for the purpose of raising revenue. There is no tax on denatured alcohol even if it is intended for beverage purposes. If there is no tax attached to denatured alcohol, there could be no fraud of revenue, and Sections 3281 and 3257 could not be invoked. Those sections are repealed by the National Prohibition Act.

In the case of United States against 2,000 cases of whiskey, etc., in October, 1921 (277 Fed. p. 410), the Court held that the Eighteenth Amendment of the National Prohibition Act completely changed the policy of the United States, and decided that Section 3453 of the Revised Statutes of the United States could not be invoked for the purpose of bringing a libel proceeding on the grounds of fraud of Internal Revenue, because there was no revenue of which the Government could be defrauded. The Circuit Court of Appeals said in part:

> "We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, but being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes, it has elected its own machinery (as listed in Section 24, *supra,* and Title 2, Sec. 29), to accomplish the desired result.
>
> We are theerfore of the opinion that Section 3453 has been repealed and hence the decree below should be affirmed."

The libel was dismissed.

Since this case was decided, the Willis-Campbell Act sought to reenact all prior Internal Revenue Laws regarding taxes on intoxicating beverages not inconsistent with the National Prohibition Act. Assuming, but not granting, that Section 600-A does permit a tax on denatured alcohol, counsel urges that this tax would then be a penalty, and if a penalty, there could have been no fraud of revenue and again Sections 3257 and

3281, which provide for forfeiture in the event of fraud of revenue, could not have been invoked. This Court in Lipke *vs.* Lederer, 259 U. S., p. 557, said:

> "The mere fact that the Statute uses the word tax, does not make it a tax if from the general nature and intention of the Statute, it is seen that a penalty is meant."

Whether or not the word "tax" means a penalty, depends upon whether or not the statute is a punitive measure. In the Lipke case a so-called tax was levied on a violator of the National Prohibition Act, under Section 35 of that Act, which provides for a double tax with an additional penalty of $500.00 on retail dealers, and a thousand dollars on manufacturers who violate any of the terms of the National Prohibition Act. An attempt was made to forfeit the property both real and personal of the defendant, unless the tax imposed was paid.

Lipke, who was charged with violation of the National Prohibition Act, filed a bill and sought an injunction preventing the proposed action of the Government to confiscate his property, and the Supreme Court of the United States in deciding the question, held that the mere use of the word "tax" is not enough to show that within the true intendment of the term, a tax was laid, when by the very nature of the imposition a penalty was meant.

In Regal Drug Corporation *vs.* Wardell, 260 U. S. 387, the Court said:

> "Since the decision of the Circuit Court of Appeals we have decided a case which is a neces-

> sary factor to be considered (Referring to Lipke *vs.* Lederer, quoted *supra*). * * *
>
> The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide for the support of the Government': the function of a penalty clearly involves the 'idea of punishment for infringement of the law; and that a condition of its imposition is notice and hearing.' "

Section 609 (Section 506, Title 26, Internal Revenue) provides for a tax of $6.00 for every barrel of fermented liquor brewed, manufactured, sold or removed for consumption or sale. In construing that section which was also reenacted by the Willis-Campbell Act in November, 1921, it has been held that the word "tax" mentioned in said section, means penalty. U. S. *vs.* American Brewing Co., 296 Fed. 772, decided in 1924; U. S. *vs.* 2,615 Barrels, 1 Fed. (2d) 500, decided in 1924.

In U. S. *vs.* American Brewing Co., *supra,* the Court said in part:

> "We are clearly of opinion that for several reasons the provisions of the Internal Revenue Laws do not apply to any of these cases, and these libels and search warrants must stand or fall under the authority of the National Prohibition Act. The authorization of warrants of search and seizure under the Internal Revenue Laws and Sections 3340 and 3450 of the Revised Statutes (Comp. St. SS 6146, 6352), dealing with the forfeiture of property, are solely in aid of the collection of taxes. But the so-called tax imposed by Section 608 of the Act of February

> 24, 1919 (Comp. St. Ann. Supp. 1919, S. 6144*bb*), re-enacted in 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this. Helwig *vs.* U. S., 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614; Lipke *vs.* Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061; Regal Drug Corporation *vs.* Wardell, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318."

U. S. *vs.* 2,615 Barrels, *supra*, in referring to Section 608 of the Revised Statutes, the Court held as follows:

> "We are clearly of the opinion that for several reasons the provisions of the internal revenue laws do not apply to any of these cases, and that these libels and search warrants must stand or fall under the authority of the National Prohibition Act. The authorization of warrants of search and seizure under the internal revenue laws and sections 3340 and 3450 of the Revised Statutes (Comp. St. sections 6146, 6352), dealing with the forfeiture of property, are solely in aid of the collection of taxes. But the so-called tax imposed by section 608 of the Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, sections 6144 *bb*), re-enacted in 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this"—referring to Helwig *v.* United States, 188 U. S. 605, 23 Sup. Ct. 427, 46 L. Ed. 614, Lipke *v.* Lederer, 259 U. S. 560, 42 Sup. Ct. 549, 65 L. Ed. 1061, and Regal Drug Corporation *v.* Wardell, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318. * * *
>
> "Cases like the present will be disposed of, as was clearly intended by Congress in the enactment of the National Prohibition Act and its supplements, without regard to the effort, as was

> said, to bolster *under the revenue statutes*, since we remain of the opinion as heretofore expressed in United States *v.* Spencer *et al.*, 292 Fed. 871, that 'it was no doubt intended that the National Prohibition Act should furnish a full, complete, and adequate remedy for the enforcement of national prohibition, and it is not unreasonable that those employed for that purpose should be confined to the means and remedies thereby afforded to accomplish this end.' And it might be added that under its provisions we believe adequate, full, and complete justice can be meted out in the enforcement of the Eighteenth Amendment." (Italics ours.)

The taxes referred to in Sections 600-A and 608 of the Revised Statutes which were repealed by the National Prohibition Act, as held in the Yuginovich case decided by this Court and which were reenacted by the Willis-Campbell Act of November 23rd, 1921, does not necessarily mean that the taxes which were in effect prior to prohibition, now may be considered as taxes.

III.

Section 3257 of the Internal Revenue Laws, and Section 25, Title II, of the National Prohibition Act, are in direct conflict, and under the Willis-Campbell Act, a prosecution, if the two laws conflict, must be brought under the National Prohibition Act.

Section 3257 is the basis for count 2 of the libel.

Section 25 of Title 2, N. P. A., provides as follows:

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture

of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the Court shall otherwise order. No such warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied, not transiently but solely as a residence in an apartment house, hotel, or boarding house.

The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

If Section 25 of Title 2, N. P. A., and 3257 are in direct conflict, then under the Willis-Campbell Act, 3257 remains repealed. Both sections refer to liquor. Both sections refer to personal property, and although the word, "property" is used in Section 25 of Title 2, personal property is meant for the reason that reference is made to a replevy of said property. Under Section 25, a seizure must be made by means of a

search warrant, and under Section 3257, no search warrant is required to seize the personal property contained in the distillery.

Under Section 3257, the property seized and forfeited, becomes confiscated to the Government, and in addition thereto, the person who carries on the distillery is subjected to a fine and imprisonment. No such provision is made in Section 25 of Title 2. On the contrary, under Section 25 of Title 2, the liquor or property seized is subject to the disposition of the Court only. A discretionary power is vested in the Court to dispose of the property, as the best interests of justice may require. Under Section 3257 of the Revised Statutes, the property becomes confiscated to the Government, and can be sold by the Government. Under Section 25 of Title 2, the property seized which was designed for the unlawful manufacture of liquor, must be destroyed, unless the Court otherwise orders. These two sections undoubtedly are in direct conflict and using the same line of reasoning, as contained in the Commercial Credit Co. *vs.* The United States, *infra*, it would appear that if any proceeding at all was taken by the Government, it was compelled to act under Section 25 of Title 2, instead of Section 3257.

In Commercial Credit Co. *vs.* U. S., 276 U. S., page 226, decided on February 20th, 1928, this Court, analyzing the Internal Revenue Law under which a vehicle was forfeited, and Section 26, Title 2 of the National Prohibition Act which also provides for forfeiture of vehicles, held that an essential distinction existed between the two sections, and dismissed the libel, on the

grounds that there was a direct conflict between the two sections.

In United States *vs.* 63,250 Gallons of Beer, 13 Fed. (2d), p. 242, Section 25 of Title 2 was construed to refer to personal property only, and not to realty. The Court said in part:

> "'Section 25 of the National Prohibition Act is to be read in connection with the Espionage Act, which it incorporates. It relates to property which is movable, and can be disposed of as movable property by destruction or return, and which could be made the subject of replevin proceedings. Real estate and things annexed to real estate are not within its purview, but are to be dealt with under Section 22 of that act, in connection with the use of the premises.'
>
> "The same conclusion has been reached in other jurisdictions. See Mellet & Nichter Brewing Co. *vs.* U. S. (D. C.), 296 F. 765; U. S. *vs.* American Brewing Co. (D. C.), 296 F. 772-777."

IV.

Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws are in direct conflict.

Section 3281 provides for the forfeiture of real property and for the forfeiture of any interest that a person may have in the lot or tract of land on which the distillery is situated who knowingly permitted such acts to be done as to defraud or attempt to defraud the United States, of taxes.

Section 22 of Title 2 does not provide for the forfeiture of real property. It is not so drastic as Section 3281. It declares that an action to enjoin a nuisance may be brought where any house, room or building or place is used in violation of the National Prohibition Act, and that the premises may be padlocked. It also provides that leases may be forfeited at the option of the lessor, where the tenant has violated the National Prohibition Act. No provision is made with respect to innocent parties with respect to padlocking the premises. Under Section 22 of Title 2, it makes no difference whether the landlord had knowledge of the violations occurring in his premises. The place may be padlocked, irrespective of his knowledge or consent.

Section 3281 only permits the forfeiture of real property where there is knowledge and intention on the part of the person with respect to the violations. In other words, under Section 3281 of the Revised Statutes, innocent owners of real property, are apparently protected. Under Section 3281, if the owner of the property did not know that the lessee was committing a crime, his premises cannot be forfeited.

Under Section 22 of the National Prohibition Act, the premises may be padlocked irrespective of the owner's or landlord's innocence. There is an apparent conflict therefore, between Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws, and if any proceedings at all were brought, with relation to the real property owned by the Waterloo Distilling Corporation, they should have been brought under the National Prohibition Act, to padlock

the premises for a period of one year. Section 3281 of the Revised Statutes cannot be applicable, for the reason that there are no taxes on distilled spirits of which the Government can be defrauded. This apparently is the reason why the drastic punishment of confiscation was not carried over into the National Prohibition Act, and explains the reason for the conflicting penalties provided for in the event a distiller does not comply with the laws.

It was held *In re* Crescent Beverage Co., decided August 2, 1923, 297 Fed. p. 1009, that the real property can be seized and disposed of by the Government only as provided for in Section 22 of Title 2. The Court in that case held in part, as follows:

> "The right of the petitioner to conduct its plant had been recognized by the Bureau of Internal Revenue, and hence the seizure of its building, machinery and product in course of manufacture had no lawful foundation whatsoever. But, even if a proper foundation for a seizure had existed, the seizure of the premises could not properly be made by virtue of a search warrant. Section 22, Title 2 of the National Prohibition Act (Comp. St. Ann. Supp., 123, S. 10138½*k*), prescribes the method by which the brewery premises may be taken from the possession of the owner. Section 25 of the same act (Comp. St. Ann. Supp. 1923, S. 10138½*m*), and Title II of Public Law No. 24 of the 65th Congress, approved June 15, 1917 (40 Stat. p. 228 Comp. St. 1918 Comp. St. Ann. Supp. 1919, S. 10496½ a *et seq.*), prescribed the practice after seizure upon search warrant, and was not observed in the present case. We are of the opin-

ion that the seizure of the premises, machinery and product in course of manufacture was without warrant of law, and think it is our duty in the premises to make an order for the return thereof."

Again the same conclusion was reached in U. S. *vs.* 63,250 Gallons of Beer, 13 Fed. (2d), p. 242, wherein the Court also stated that real estate is not within the purview of Section 25 of the National Prohibition Act, but must be dealt with under Section 22. Both cases above quoted were decided subsequent to the enactment of the Willis-Campbell Act on November 23rd, 1921, and the Courts held in both cases, that the National Prohibition Act must be followed, in the event any proceeding is taken with reference to the forfeiture of real or personal property.

V.

The Waterloo Distilling Corporation having been indicted and convicted together with others for conspiracy to violate the National Prohibition Act, penalties or suits for forfeitures because of said violations must be pursued under the National Prohibition Act on the theory that the Government having elected to indict and convict for violation of the National Prohibition Act is barred from making any further prosecutions under the Internal Revenue Laws.

THE WATERLOO DISTILLING CORPORATION WAS CONVICTED FOR VIOLATING THE NATIONAL PROHIBITION ACT.

THE WATERLOO DISTILLING CORPORATION, together with several other defendants, was indicted by the

Grand Jury of the United States at a term of the District Court of the United States for the Western District of New York, for conspiracy to violate the terms of the National Prohibition Act, and the defendant corporation was found guilty of such violations and directed to pay a fine of $10,000.00 on June 2, 1928. The indictment against the defendant reads in part as follows, to wit, that the defendants

> "Knowingly, wilfully, unlawfully and feloniously did conspire, combine, confederate and agree together and with one and another and each with the other, and with divers other persons to said Grand Jurors unknown,—to wit; to knowingly, wilfully, unlawfully and feloniously violate the terms and provisions of an Act of Congress of October 28th, 1919, entitled an act to prohibit intoxicating beverages and to regulate the manufacture, production and use and sale of high proof spirits for other than beverage purposes and insure an ample supply of alcohol and promote the use in scientific research and in the development of fuel, dye and other lawful industries, the title of which Act of Congress is 'National Prohibition Act', and which act of Congress is commonly known as 'The Volstead Act', in that they would manufacture, possess, keep, barter, sell, transport, deliver, distribute, accept and receive intoxicating liquor and distilled spirits, to wit, alcohol for beverage purposes, which said alcohol would then and there contain more than one-half of one per cent of alcohol by volume and would then and there be fit for use for beverage purposes, and specially denatured alcohol would then and there contain more than one-half of one per cent of alcohol by volume,

> contrary to and otherwise than as authorized by the said National Prohibition Act. * * *"

The Court in charging the Jury that tried the within petitioner and the others on the indictment above referred to, said in part as follows:

> "So that this alleged conspiracy with which the defendants are charged, is a conspiracy, or an agreement made between them, as it is claimed, to violate this United States Act, that is the law, the National Prohibition Act, which provides for the manufacture and use and distribution of alcohol."

The Government in its brief in the criminal action in which the Waterloo Distilling Corporation was found guilty of conspiracy to violate the National Prohibition Act, specifically referred to various sections in the National Prohibition Act, which were violated. The sections referred to in the National Prohibition Act were Section 4 of Title 2 (Section 13, Title 27, U. S. C.), Section 29, Title 2, N. P. A. (Section 46, Title 27, U. S. C.), Section 15, Title 3, N. P. A. (Section 85, Title 27, U. S. C.), Section 13, Title 3, N. P. A. (Section 83, Title 27, U. S. C.).

Section 4 of Title 2 provides that denatured alcohol when produced and used as provided by law, shall not be subject to the provisions of the National Prohibition Act. Section 29 provides for a penalty of $500.00 for making of false records.

Section 15 of Title 3 of the National Prohibition Act provides as follows:

> "Whoever operates an industrial alcohol plant or a denaturing plant without complying

with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offenses to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation."

THE PROPERTY, BOTH REAL AND PERSONAL, OF THE DEFENDANT WAS LIBELLED UNDER THE INTERNAL REVENUE LAWS (the Sections having been enumerated heretofore).

All Sections of the Revised Statutes above enumerated are statutes under Internal Revenue Laws and were in existence and in effect prior to the enactment of the National Prohibition Act.

Under the Act of March 3, 1927, Congress gave the Secretary of the Treasury the right to transfer from the Collector of Internal Revenue to the Prohibition Commissioner all the rights, privileges, powers and duties heretofore imposed on the Commissioner of Internal Revenue by any law in respect of the taxation—or any other law relating to the enforcement of the Eighteenth Amendment.

Under Treasury Decision No. 1, the Secretary of the Treasury, pursuant to said Act of March 3, 1927, did transfer the powers heretofore imposed on the Collector of Internal Revenue to the Prohibition Commissioner only insofar as said duties and privileges applied to the enforcement of the National Prohibition Act, so that under the present laws and treasury decisions, the powers and duties heretofore imposed on the Collector of Internal Revenue now vest with the Prohibition Commissioner. The question that arises is whether the Prohibition Commissioner has the right to invoke the Internal Revenue Laws to forfeit the property of the defendant where the defendant had previously been convicted and punished for violating the National Prohibition Act.

Whether the Government has the power to proceed under either the Internal Revenue Laws or the National Prohibition Act depends whether or not both laws are operative and run side by side and do not conflict. Subsequent to the enactment of the National Prohibition Act it was held that all Internal Revenue Laws with regard to violations of manufacture and taxation of and traffic in intoxicating liquor had been superseded by the National Prohibition Act. United States *vs.* Yugenovich, 256 U. S. 450, decided June 1, 1921.

On November 23rd, 1921, it was enacted that all prior Internal Revenue Laws with regard to the manufacture and taxation of and traffic in intoxicating liquors were to continue in force except such provisions of such laws as are in direct conflict with the

National Prohibition Act. The enactment is now Section 3 of Title 27 of U. S. C. A. and is as follows:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and penalties for violations of such laws that were in force, on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provisions of this title; but if any act is a violation of any such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other." (Nov. 23, 1921, c. 134 S. 5, 42 Stat. 223.)

Whether or not the Government had the power to forfeit the property of the defendant under the Internal Revenue Laws must be determined by the fact as to whether or not said Internal Revenue Laws are in conflict with the National Prohibition Act.

The Willis-Campbell Act is clear and mandatory. It leaves no room for discretion on the part of the Prohibition Commissioner. If the Internal Revenue Laws are in conflict with the National Prohibition Act, then the penalties to be inflicted on any violators must be those penalties as provided for in the National Prohibition Act and not the Internal Revenue Laws.

Furthermore, if any part of the National Prohibition Act has been violated and a conviction secured thereon, subsequent prosecutions for the same acts, if made at all, must be made by the Government, under the National Prohibition Act.

This Court has considered this question in Commercial Credit Company *vs.* United States of America, 276 U. S. 226, decided on February 20, 1928. In that case a libel was brought by the United States under Section 3450 of the Revised Statutes of the Internal Revenue Laws to forfeit an automobile used in the removal, deposit and concealment of intoxicating liquor with the intent to defraud the United States of tax. The Court ruled against the Government, and held practically, that a prosecution under the National Prohibition Act bars further prosecutions under the Internal Revenue Statutes.

We therefore submit that in the case at bar the Government likewise was barred from proceeding under the Internal Revenue Laws to bring the within libel.

The libel in the within case should have been dismissed on the following grounds:

1. That the provisions relating to penalties and forfeitures as incorporated in the National Prohibition Act are in conflict with the Internal Revenue Laws, and

2. The Waterloo Distilling Corporation having been prosecuted criminally under the National Prohibition Act, the Government is deemed to have elected the remedies it would pursue and is barred from bringing a forfeiture proceeding under the Internal Revenue Laws. (See Sec. 3 of Title 27 of U. S. C. A.) See U. S. *vs.* Waterloo and others decided in this Court.

In United States *vs.* Goldman, 28 Fed. (2) 424, the defendants therein were indicted for conspiracy to

violate the National Prohibition Act. Two of the defendants interposed a plea in bar, claiming immunity under Section 30, Title 2 of the National Prohibition Act, which provides that witnesses who testified in obedience to a subpœna shall not be subjected to any penalty or forfeiture, etc. The Government in that case demurred to the plea in bar, contending that the prosecution was for conspiracy to violate the National Prohibition Act and not to violate the National Prohibition Act itself, and therefore the plea in bar could not be invoked. The Court held that the defendants could properly claim immunity because of the National Prohibition Act even though the charge was for a conspiracy to violate the National Prohibition Act and not for a violation of any part of the Act itself.

U. S. *vs.* McKee (Federal cases 15,688), is on all fours with the case at bar. This case was quoted by this Court in Coffey *vs.* U. S. 116 U. S. 445, and is as follows:

> "The defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The two alleged transactions were but one, and it was held that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be

> twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for penalty."

In Thomas and Vincent Murphy *vs.* United States, 272 U. S. 630 (71 L. Ed. 446), it was held as follows:

> "If we are right as to the purpose of section 22, the decree in the present case did not impose a punishment for the crime for which the appellants were acquitted in the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar."

It will be observed from the above quoted decision that by analogy the Court held that if the defendants had been prosecuted for a penalty under the Prohibition Act, as in this case, its judgment would have been different.

The Government's contention in the District Court, that these penalties are cumulative, and therefore can be imposed to defeat the protection given to the people by the Fifth Amendment of the Constitution (not to be prosecuted more than once for the same offense) is purely fanciful and not based on sound legal principles.

We strenuously deny that the penalties sued on are cumulative with the penalties under the National Prohibition Act, but assuming that the penalties are cumulative, the result sought to be accomplished by the Government can never be obtained without violation of Constitutional privileges.

VI.

Real and personal property not bonded and not part of the distillery premises was not subject to forfeiture.

Regulations 61 provide that an applicant for a permit to conduct a distillery and bonded warehouse shall describe the specific property to be used for such purposes, with the same detail as in a deed to such property. The Regulations explain that this is important because the Government acquires important rights in such specific property, and among other rights, it mentions the right of forfeiture. In the instant case the Waterloo Distilling Corporation owned property, both real and personal, in addition to the property described in such application for the distilling premises. The specific premises covered by the permit was described in detail in the permit, and also covered by a map filed

We submit that the property not covered by the permit for distilling operations was not subject to forfeiture, merely, because it was owned by the Waterloo Distilling Corporation at the time of these alleged violations.

In Edward Ryan *vs.* U. S. of America, Circuit Court of Appeals, 9 Circuit Number 6184, decided November 17, 1930, and which appeared in the U. S. Daily 2154 dated December 16, 1930, the Circuit Court held in effect that there can be no forfeiture of any property, unless used, where the untaxed liquor was manufactured. In the case at bar the unbonded premises is an island and, while adjacent to the distillery premises on the mainland, is not used as a means of ingress and

egress, being entirely separate and distinct from such distillery premises.

This island does not appear in the map covered by the application for the distillery on file with the Government, and part of this record, and is not described in the permit covering the distillery premises issued to the Waterloo Distilling Corporation.

VII.

Without intending to waive any of the other assignments of errors and the exceptions appearing in the record, in order to avoid the expansion of this brief, the petitioner nevertheless commends them to the consideration of the Court as enforcing the various points above argued.

Conclusion.

It is respectfully submitted that the decree of the United States Circuit Court of Appeals should be reversed.

Respectfully submitted,

LEWIS LANDES,
Solicitor for Petitioners.